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No.

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

80-5939

SHAO FEN CHIN, Individually and as Administrator of the Estate of KE-SIEN, Deceased,

Appellant,

-against-

ST. LUKE'S HOSPITAL CENTER, VICE PRESIDENT CHARLES W. DAVIDSON, DRS. SEIICH SHIMOMURA, ARMAND REYES, WADE JOHNSON and OREST HURKO,

Appellees.

ON APPEAL FROM THE FINAL JUDGMENT OF COURT OF APPEALS, NEW YORK STATE

JURISDICTIONAL STATEMENT

SHAO FEN CHIN
Appellant
370 Riverside Drive,
New York, N.Y. 10025
(212) 865-3298

New York, New York
December 2, 1980

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
QUESTIONS PRESENTED	1
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES	2
STATEMENT OF THE CASE	3
THE QUESTIONS ARE SUBSTANTIAL	8
APPENDIX	
Statute CPLR 3404	A-1
Judgment dated October 14, 1980	A-2
Notice of Appeal dated November 5, 1980	A-3

TABLE OF AUTHORITIES

Page

CASES

Fedoryszn v. Weiss, 1970, 310 N.Y.S. 2d 55, 62 Misc 2d 889 9

Marco v. Sachs, 1962, 10 N.Y. 2d 542, 226 N.Y.S. 2d 353, 181 N.E. 2d 392 8,9

National Association for Advancement of Colored People v. St. of Ala., ex rel. Patterson, Ala. 1958, 78 S. Ct. 1163, 357 U.S. 499, 2 L.Ed. 2d 1488 2

Schloemer v. Uhlenhopp, 1946, 21 N.W. 2d 457, 237 Iowa 279 8

Wirtz v. Thompson Packers, Inc., D.C. La, 1963, 224 F Supp 960 9

CONSTITUTIONAL PROVISIONS AND STATUTES

CPLR 3404, 205 (a) ..... Passim,

New York State Constitution Article 1, Section 2 8,9

New York State Constitution Article 1, Section 16..... 9

U.S. Constitution, Amendment 7 2,8

U.S. Constitution, Amendment 14, Section 1 ..... Passim

U.S. Code Title 28, Section 1257 (2) 2

U.S. Code Title 28, Section 1654 2,9

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ON APPEAL FROM THE FINAL JUDGMENT OF COURT OF APPEALS, NEW YORK STATE

JURISDICTIONAL STATEMENT

QUESTIONS PRESENTED

1. Can State Supreme Court use discretion of CPLR 3404 twice denying my motions to restore to trial calendar, when defendants twice did not submit opposition papers and defaulted at hearings? Whether violated due process.

2. Can State Supreme Court use discretion of CPLR 3404 denying my motions to restore to trial calendar, when my cause of action of wrongful death is guaranteed by the State Constitution, when the case was ready on jury trial by telephone assigment, but the trial judge wanted to try without jury? Whether violated due process and right of trial by the jury.

3. The trial judge ordered me to find a lawyer in 90 days for trial, whether was in conflict with U.S. Code, Title 28, Section 1654, right to prosecute in person.

4. When I was appealing to remove the trial judge, Justice Eugene R. Wolin called the trial and struck the case from the calendar, whether he violated due process.

5. When I was appealing the Supreme Court order to the Court of Appeals, the Chief Judge dismissed my appeal as nonfinal, ended my case with a neglect to prosecute, whether violated due process.

OPINIONS BELOW

No opinion appeared in the official Edition New York Law Reports.

JURISDICTION

An appeal was taken from the final judgment of the Court of Appeals, State of New York dated October 14, 1980, which dismissed my appeal as nonfinal, without reviewing the constitutional questions.

My appeal was taken to this Court pursuant to U.S. Code, Title 28, Section 1257 (2)

> "Jurisdiction of U.S. S. Ct to review by certiorari the denial of certiorari by State Supreme Court is not defeated, on theory that state court's decision rests on an independent nonfederal ground, if such nonfederal ground is without any fair or substantial support. National Association for Advancement of Colored People v. State of Ala., ex rel. Patterson, Ala. 1958, 78 S. Ct. 1163, 357 U.S. 449, 2 L. Ed. 2d 1488"

Notice of Appeal was filed on November 5, 1980 in the Supreme Court of the State of New York, County of New York.

I found under prior law, my case was appealable. But, under present law, it was by writ of certiorari. Since I have another appeal treated as writ of certiorari in this Court, I respectfully request the two appeals be reviewed together.

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Constitution Amendment 7, Amendment 14, Section 1; U.S. Code, Title 28, Section 1654.

STATEMENT OF THE CASE

The following is my statement which can be supported by proofs.

My wife, KE-SIEN CHIN, was a healthy person. In the winter of 1973, while she was walking on a New York City street, she tripped by broken concrete surrounding a manhole, fell and broke her left knee.

She went to defendant ST. LUKE'S HOSPITAL for treatment. The doctor made a plaster cast.After 6 weeks, the knee healed. They arranged an appointment for a routine check up of the knee.

The day before the appointment, on January 30, 1974, a nurse called my home to cancel the appointment, but asked my wife to come to the admitting office the next day.

I accompanied her to the hospital, where 3 doctors persuaded my wife to be admitted. My wife was reluctant, but they said it was a general check up for her benefit and for only 5 days. Then, my wife consented.

But, it was in fact a selected admission for the purpose of experiment.

They drew her blood 3-5 tubes a day, once 12 tubes I believe for transfusion to other patient. Besides, they conducted metastatic series and introduced dense quantities of bacteria into her body.

Such numerous tests subjected her and her liver to irreparable damage. My wife developed diarrhea in the hospital.

By the end of 5 days, the doctors did not let her go home, but continued with tests for another week. The day before discharge, the doctors by biopsy diagnosed my wife had cirrhosis of an unknown origin. Upon knowledge and belief, it was the result of the experiment and tests because my wife never had liver disease in her medical history before.

On the day of discharge, February 15, 1974, I asked the

doctor for treatment of cirrhosis. He said "She does not need".

After discharge, my wife's diarrhea increased to 7 and more than 10 times a day for 6 months till August, which made her confined to bed most of the time. She went to the Emergency Clinic and regular Clinic 5 times. But, the doctors only gave her commercial antidiarrheal which gave my wife no relief. Defendant DR. SHIMOMURA gave her antibiotic which cause my wife to develop ascites and edema, which was a factor in my wife's eventual tragic death.

On August 9, 1974, my wife was admitted to said hospital again.

Defendant DR. REYES, the attending doctor, was doing research, intentionally diagnosed my wife had rare and incurable biliary cirrhosis, drew her blood, continued the immunological experiment with his assistant and did not give her proper treatment.

Despite my repeated requests to provide my wife with blood transfusion, glucose and serum albumin, all were effective in treating cirrhosis, defendant DR. REYES all refused for fear of spoiling the data.

After DR. REYES was transfered , I took two names of specialists of said hospital to the Vice President of Operations EVELYN PECK to get her permission to employ one as my wife's private doctor because only defendant intern DR. JOHNSON was treating her. But, Vice President Evelyn Peck intentionally obstructed letting me to discuss with defendant DR. JOHNSON or the headnurse. I believe her aim was to let DR. JOHNSON collect data.

Defendant DR. JOHNSON with malice gave my wife calcium gluconate, a metallic chemical, 5 times more than the U.S. allowance for healthy person, which caused my wife to have calcium poisoning.

On September 27, 1974, said defendant intentionally

gave my wife a codeine to be taken with a 500 mg Chloral Hyrate, which caused my wife paralyzed by dizziness for 24 hours,and since that time, she could not get off bed again.

On October 3, 1974, as my wife daily expected a qualified doctor to treat her, I finally,through the help of a friend, got consent of head of the Gastroenterology Department, Dr. Peter Holdt, to be her private doctor, who prepared to transfer my wife to another department the next day to treat her himself.

My daughter and I packed my wife's things for moving the next day. We left my wife at 8:30 P.M. At midnight, a doctor called from the hospital telling me that my wife was seriously ill. The time was 12:40 A.M. We rushed to the hospital and arrived at 12:50 A.M. But, the guard by doctors' order held us downstairs for 5 munutes.

When we went upstairs, we saw defendant intern on duty DR. HURKO and a chaplain. DR. HURKO told me my wife already died. I believe defendants DRS. JOHNSON and HURKO forced her to death because when I asked the chaplain the time of death, he wrote on a slip of paper 12:55,which means she died within the 5 minutes they held us downstairs.

When we saw my wife, her color, temperature were as alive. I felt her pulse slightly beating. I opened her eye lids, her eyes were shinging as alive. My daughter heard an answering sound. Later, I found enough medical evidence to indicate she was in coma with respiratory depression, but we did not know.

I asked defendant DR. HURKO whether there was time to save her. He said "No". I asked him whether they used any emergency measure. He said "No" because there was no doctor and no medicine. I asked what medicine they gave her. He said a pain killing drug. After I reproached them that a week ago, I warned the headnurse never to give this medicine again, his

face turned pale and he took the chaplain out. I believe to consult with DR. JOHNSON. He came within 1 minute and denied giving this medicine. But codeine appeared in the hospital record.

In 1975, I brought an action in the Supreme Court of the State of New York, County of New York, which was dismissed without prejudice to reinstitute upon becoming the Administrator of my wife's estate.

I reinstituted the suit in February, 1976.

At the malpractice panel hearing in November, 1978, Justice Nathaniel Helman led the other two panel members made a prejudicial, biased decision in 30 minutes that all defendants were not liable despite of my 86 allegations, 2 hospital records and a confidential report. I wonder whether he had any sense of justice and fairness. I wonder why my confidentail report to Justice Helman reached to defense attorney's office.

I was notified by Justice Helman the case was sent to a trial part for trial in January, 1979.

This part was Part 17A, presided by Justice Israel Rubin. After 3 pre-trial conferences, I persisted to be tried by the jury and objected to settle. On May 31, 1979, Justice Rubin notified both parties the case was on telephone assignment for jury trial.

But, it was transfered to the Supreme Court Branch in the Civil Court Part 61 of Justice Eugene R. Wolin. There, I had another pre-trial conference, in which Justice Wolin pressured me to settle.

At the same time, the defendants made motion to dismiss 3 principal wrongful death defendants, two of them were murder suspects. It was illegal because it was made 5 years after expiration of time to answer,when the case was ready on jury trial, 2 defendants asserted affirmative defense in their answers. Besides,

wrongful death action can never be dismissed under the State Constitution.

Justice Xavier C. Riccobono illegally granted the motion despite my strong opposition. I made a renewal motion pointing defendants' motion was untimely. But, defendants illegally requested again in their opposition paper to dismiss defendants under summary judgment which was illegally granted without immediate trial as statute required. It was without due process to request to dismiss defendants twice.

I appealed to the Appellate Division which unanimously and illegally affirmed Justice Riccobono's order. After dismissal by the Court of Appeals as nonfinal, I took appeal to the U.S. Supreme Court.

At that time, I brought an Article 78 proceeding for writs to review, to prohibit Justice Wolin because he illegally ordered me to find a lawyer in 90 days for trial against my right to prosecute in person.

My Article 78 proceeding was dismissed by the Appellate Division unanimously,without opinion.

Then, I found out my case was sent to be disposed as commercial case,to be tried by the judge as simplified procedure, which deprived my constitutional right to be tried by the jury.

When I was making motion for permission to appeal the Article 78 proceeding, which stayed the trial because I was appealing to remove the trial judge, Justice Wolin illegally called the trial on March 12, 1980 and struck my case from the trial calendar.

I made motion to restore and a renewal motion on May 2, 1980 and July 4, 1980 and submitted affidavit of merits. But, Justice Beatrice Shainswit twice denied without opposition papers and when defendants defaulted at hearings.

Such denial illegally ended the case forever because according to CPLR 3404, when a case was struck from the calendar,

if not restored within 1 year, shall be dismissed by the Clerk as neglect to prosecute. New York City Civil Court Rules and New York State Supreme Court,New York County Rules both state restore to calendar should be made by motion. But, Justice Shainswit intentionally stated it must be by appeal. Since the statute provides by motion, her ground of denial was illegal.

Under the State statute CPLR 205 (a), extension of time to start new action is not available to a suit dismissed as neglect to prosecute. This deprived my right to vacate default after 1 year despite I made a timely motion to restore before expiration of 1 year. Therefore, her order finally ended my case.

I appealed to the Court of Appeals. But, my appeal was dismissed without a quorum* by the Court of Appeals Chief Judge sua-sponte as nonfinal. In my appeal for dismissal of 3 defendants, the Chief Judge designated my renewal motion as motion to vacate. According to case law,my case is final. Marco v. Sachs 1962, 10 N.Y. 2d 542, 226 NYS 2d 353, 181 N.E. 2d 392. Thus, my case prosecuted for 5 years, which has wrongful death cause of action, a preserved State constitutional right, was ended by illegal process by the New York State Courts without any consideration of law and my right.

THE QUESTIONS ARE SUBSTANTIAL

Under the U.S. Constitution, Amendment 7, right of trial by jury applies also to state cases when the State Constitution gurantees this right.

> "State constitutional provision that right of trial by jury shall 'remain inviolate' is not to be construed any differently than provision of this amendment that such right shall be preserved. Schloemer v. Uhlenhopp, 1946, 21 N.W. 2d 457, 237 Iowa 279"

In New York State this right is preserved by the State Constitution, Article 1, Section 2, which shall be inviolate forever.

> "Right to jury trial preserved by this amendment is guaranteed by Mc Kinney's

New York Constitution Art 1, Section 2
Pedoryszn v. Weiss, 1970, 310 N.Y.S.
2d 55, 62 Misc 2d 889".

This right applies to statutory actions as well as common law suits.

"Fact that action was statutory action did not prevent it from being within scope of this amendment granting jury trial and as a matter of right Wirtz v. Thomoson Packers, Inc., D.C. La. 1963, 224 F Supp 960".

My case was transfered to Part 61 to be disposed of as commercial case by simplified procedure, with waiver of jury trial without my knowledge, when I had 86 allegations of issues of facts.

Ordering me to find a lawyer was against my right under the State statute to prosecute in person and in conflict with federal statute U.S. Code, Title 28, Section 1654.

Justice Beatrice Shainswit twice applied discretion under CPLR 3404 denied my motion and renewal motion to restore when defendants twice defaulted at motion hearings and did not submit opposition papers; Chief Judge of Court of Appeals dismissed my appeal, forever ended my case; was without due process. But, precendentsindicates Court of Appeals reviewed such cases. Marco v. Sachs, 1962, 10 N.Y. 2d 542, 226 N.Y.S. 2d 353, 181 N.E. 2d 392.

Under the State Constitution, action of wrongful death must go through a trial with a judgment. To dismiss is without due process.

CONCLUSION

For 3 years, in all my suits, all my motions, appeals were denied and dismissed despite all my papers were made pursuant to law. Every time I requested the Court to protect my citizen's right under the Constitution, they all ignored.

I already decided if the Courts continue to prejudice me disregard my right and law, I am forced to file complaint in the State Legislature for investigation of corruption. I shall submit all evidence.

I respectfully request this Court to protect the citizen's right to a minority citizen, who should be given equal right before the law.

Dated: New York, New York
December 2, 1980

Respectfully submitted,

SHAO WEN CHIN
Appellant

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* New York State Constitution Article 6, Section 2 provides in the Court of Appeals, 5 Judges constitute a quorum, and the concurrence of 4 Judges is necessary to a decision. Therefore, the judgment of October 14, 1980 was without jurisdiction and void, reviewable to the U.S. Supreme Court.

R3404 Dismissal of abandoned cases. A case in the Supreme Court or a County Court Marcke "off" or struck from the calendar or unanswered on a clerk's calendar call, and not restored within 1 year thereafter, shall be deemed abandoned and shall be dismissed without costs for neglect to prosecute. The clerk shall make an appropriate entry without the necessity of an order.

Civil Practice Annual 1979-1980, Mathew Bender, page 1-298, 1-299

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the fourteenth *day of* October *A. D. 19* 80

Present, HON. LAWRENCE H. COOKE, *Chief Judge, presiding.*

Mo. No. 1101 SSD 109

Shao Fen Chin, Individually &c.,
Appellant,

vs.

St. Luke's Hospital Center,
& ors., Respondents.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court sua sponte, upon the ground that the order appealed from does not finally determine the action within the meaning of the Constitution (CPLR 5601[b][2]).

Joseph W. Bellacosa
Clerk of the Court

SUPREME COURT OF THE STATE OF
NEW YORK
COUNTY OF NEW YORK

SHAO FEN CHIN, Individually and as
Administrator of the Estate of
KE-SIEN CHIN, Deceased,
Plaintiff,

-against-

ST. LUKE'S HOSPITAL CENTER, VICE
PRESIDENT CHARLES W. DAVIDSON, DRS.
SEIICH SHIMOMURA, ARMAND REYES, WADE
JOHNSON and OREST HURKO,
Defendants.

NOTICE OF APPEAL

Indes No. 02586/76

SIR:

PLEASE TAKE NOTICE that SHAO FEN CHIN, the plaintiff herein, appeals to the Supreme Court of the United States, from the order made in this action on the 14th day of October, 1980 by Hon. Lawrence H. Cooke, Chief Judge of the Court of Appeals, State of New York, and entered in the office of the Clerk of Court of Appeals, on the 14th day of October, 1980 dismissing my appeal sua sponte as nonfinal.

After 5 year prosecution, my case was ready on jury trial by telephone assignment on May 30, 1980. But Justice Israel Rubin transfered my case to Justice Eugene R. Wolin's Part, who illegally ordered me to find a lawyer in 90 days and to try the case himself. Because of his prejudice, I took appeal to remove him as the trial judge, but at that time, he illegally ordered trial when I was appealing and struck my case from calendar.

Then,I made motion to restore before 1 year expiration of time. But, Justice Beatrice Shainswit of the Supreme Court, New York County twice denied my motion and renewal motion to restore without opposition papers and even defendants defaulted at the hearings, by discretion.

I believe she collaborated with other Justices to

destroy my case forever because according to CPLR 3404, case not restored within 1 year ends with a dismissal for neglect to prosecute which does not extend time to start a new action. But, dismissal for not answering trial calendar call is not neglect to prosecute; therefore her denial to restore will result a dismissal for neglect to presecute. Thus, no other judge can vacate the dismissal afterwards. According to law, order denying to vacate dismissal is nonfinal, but her order ended my case, prevented me to vacate dismissal is final. According to CPLR 5517 and Court of Appeals precedent, a subsequent order denying a renewal motion on new facts is final.

According to Marco v. Sachs 1962, 10 N.Y. 2d 542, 326 N.Y.S. 2d 353, 181 N.E. 2d 392, Court of Appeals reviewed such final order from an order which reinstated dismissal for neglect to prosecute for failure to restore within 1 year which was the end of the case because the plaintiffs were prevented to vacate the dismissal as result of the order.

Despite my right of action of wrongful death guaranteed under the State Constitution and my appeal taken to the U.S. Supreme Court which prohibits State Courts to dispose the parts which involved federal questions, Justice Shainswit used discretion of CPLR 3404 twice denied my motion to restore to trial calendar which was repugnant to U.S. Constitution Amendment 14, Section 1 and Amendment 7 and U.S. Code Title 28, Section 1654. The New York State Constitution Article 1, Section 2 guarantees right of trial by the jury of the U.S. Constitution Amendment 7. According to precedents, right of trial by the jury is preserved

in statutory actions as well as common law suits.

Chief Judge Lawrence H. Cooke's October 14, 1980 order dismissing appeal as nonfinal refused to review. The order was also made without jurisdiction because the quorum of Court of Appeals is at least 4 Judges. But, this order was made only by the Chief Judge.

According to Court of Appeals precedent, motion to dismiss appeal must be made immediately after perfection of appeal, My appeal was dismissed after expiration of 60 day time limit to perfect appeal, when it was already on general calendar and only 12 days before on day calendar for argument and after the Clerk notified me to certify the appendix; deprived my appeal being heard on the merits by at least 4 Judge quorum.

Thus, my case prosecuted for 5 years was dismissed by illegal process in the New York Courts.

Should this Country allow New York Judges make illegal orders disregard any law to destroy a wrongful death case prosecuted for 5 years on the eve of jury trial?

Dated: New York, New York
November 5, 1980

Yours, etc.,

Shao Fen Chin

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